Sabine Frerichs
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Unravelling the European Community of Debt
Sabine Frerichs

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Europe is built on debt. Credit and debt integrate societies, both within and across national borders. Debt relations are constitutive of the European polity, and critical for its success or failure.¹ In this sense, the European Union has long been not only a ‘community of fate’ and a ‘community of law’, but also a ‘community of debt’ in which manifold bonds connect states and peoples. Solidarity between Member States as well as their citizenries has been one of the major inspirations of the European project. The recent financial crisis has put this solidarity to the test, raising difficult questions about who owes what to whom in today’s Europe.

The aim of this special issue is to unravel the European community of debt by retracing the processes through which debt and solidarity have become transnationalised and Europeanised.² Putting European law in its context, which is the mission of this journal,³ we seek to illuminate legal, economic, political, historical and cultural aspects of existing

¹ K. Dyson, States, Debt, and Power: ‘Saints’ and ‘Sinners’ in European History and Integration (Oxford University Press, 2014). While Dyson’s book focuses on public debt, it also makes clear that the prevalence of public debt, understood as sovereign debt (in the narrow sense) or as the balance of liabilities and assets of the public sector (in the broader sense), is affected, and may eventually be driven, by the financial commitments of the private sector, including corporations as well as households, within the domestic context as well as in the cross-border context of capital mobility and financial integration; see ibid., at 50-52.
² This special issue draws on contributions to the Special Issue Workshop of the European Law Journal ‘Community of Debt? The Transnationalisation of Debt and Solidarity in Europe’, which was held at the European University Institute (EUI), Florence, 19-20 November 2015. We gratefully acknowledge financial support by Wiley Blackwell in preparing this special issue and exceptional commitment by the editor of this journal to make it as informative and inspiring as possible. The workshop was organised by the research project ‘European Bonds: The Moral Economy of Debt’ (2013-17), which receives funding from the Academy of Finland and the University of Helsinki. It was hosted by the European Research Council project ‘European Regulatory Private Law’ (2011-15) at the EUI, which was funded under the European Union’s Seventh Framework Programme (FP/2007–2013)/ERC Grant Agreement n [269722], and also supported by the Finnish Academy project ‘The Many Constitutions of Europe’ (2010–15). We would like to thank all contributors, commentators, and chairs for their valuable inputs to this workshop and for engaging in a very productive interdisciplinary discussion. Special thanks go to Agustín Menéndez, Hans Micklitz, and Kaarlo Tuori.
networks of debt and solidarity, which have brought Member States, market participants, and European citizens closer to each other but also increased the potential for conflicts and crises. In turn, the Eurozone crisis offers an entry point into studying the multifaceted bonds of obligation, which condition and shape the European polity, and whose nature and extent has now become a matter of contestation. This special issue thus also contributes to contextualising the ongoing crisis and exploring its normative implications, which has been a particular interest of this journal. To get a grasp of the overall constitution of the European community of debt, we will start from its key constituents: 1) integrated capital markets, 2) interdependent welfare states, and 3) the reformed monetary union.

The proliferation of transnational debt relations within and beyond Europe is the result of processes of financial and monetary integration by means of law and governance. The major turning point in this process was the liberalisation of capital movements, which complemented the free movement of goods and services, labour and enterprise, and changed the conditions for coordination of monetary policies on the European level. It thus had an effect on both ‘layers’ of the European economic constitution. While the microeconomic

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8 For the distinction between micro- and macroeconomic layers of the European economic constitution, see K. Tuori and K. Tuori, The Eurozone Crisis: A Constitutional Analysis (Cambridge University Press, 2014).
constitution of the internal market came to spur the transnationalisation of private debt, the macroeconomic constitution was set for monetary union, which furthered the transnationalisation of public debt.

At the same time, national welfare regimes became increasingly interlinked, although less so by way of building a ‘European welfare state’ through EU level social policies than through developments both in the micro- and macroeconomic constitution.² Whereas the free movement of capital and establishment affects the capacity of Member States to raise taxes (tax base mobility), the right to free movement for workers and persons is increasingly being discussed in its effects on public spending (welfare migration). At the same time, Member State budgets are restricted by the requirements of monetary union, coordination of economic policies, and ensuing pressures towards fiscal consolidation and structural adjustment.

This introduction is structured as follows: Section I outlines the conceptual framework of the special issue, which puts relations of debt and solidarity into a sociological perspective, linking law with morality and considering the political, economic, historical and cultural context of the distribution of rights, risks, and responsibilities. Section II focuses on the historical background of the European community of debt, explaining how it came into being through processes of financial and monetary integration, which were facilitated by changes in the international economic order. The liberalisation of capital movements is identified as a key turning point in the integration process. Sections III to V each contain a closer analysis of institutional preconditions and developments in the different spheres constituting the European community of debt: integrated capital markets, which are discussed in terms of the transnationalisation of private debt (Section III); interdependent welfare states, which are addressed in terms of the transnationalisation of solidarity (Section IV); and the reformed monetary union, which is analysed in terms of the transnationalisation of public debt (Section V). Moreover, Sections III to IV also contextualise and summarise the individual articles which are included in this special issue and which will turn in much more detail to specific constellations of debt and solidarity in the European context. Section VI contains a tentative synthesis of how relations of debt and solidarity are linked across the different spheres, and how the respective rationales of distributing rights, risks, and responsibilities between

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Member States, market participants, and European citizens may interact, to further illuminate the make-up of the European community of debt.

I. Conceptual framework: Debt and solidarity in socio-legal perspective

Focusing on the European community of debt, this special issue starts from a conceptual framework that accommodates legal, economic, political, historical and cultural perspectives. Emphasis is put on the role of law in creating, shaping, and institutionalising transnational debt relations and communities of solidarity.

We understand debt and solidarity as phenomena that assume legal form but rest on moral foundations. Moreover, from a sociological point of view, debt and solidarity are social institutions that develop over time, reflecting changes in the societies whose needs they serve. In modern market economies, relations of debt and solidarity take a different (legal) form and fulfil a different (economic) function than in the ‘moral economies’ of other times and places. ¹⁰ In traditional economies, such as in feudal times, social insurance was a matter of localised debt relations, that is, a personalised network of rights and duties. ¹¹ In industrial societies, social insurance is organised on the national level and ‘no longer seen as a matter of local reciprocity but as right of citizenship’. ¹² Debt and solidarity have become more abstract and impersonalised, and are typically mediated by positive law. In the combination of modern market economies with national welfare states, ¹³ debt furthers capitalist investment and consumption, and solidarity secures, first of all, the commitment of workers. ¹⁴ But even though the most advanced (or most affluent) Western societies of today share the institutional

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¹¹ L. Fontaine, L’économie morale: Pauvreté, crédit et confiance dans l’Europe préindustrielle (Gallimard, 2008).


¹³ Also dubbed ‘moral-economy state’; ibid.

underpinnings of modern welfare capitalism, there is also some variation as to how the rights and obligations inherent in the ‘bonds’ of debt and solidarity are defined and distributed, both between countries and over time.

The overall framing of this special issue is inspired by a classical sociological method: using law as an indicator of morality, which reflects the division of labour in society, that is, a certain state of socio-economic development. In modern society, law renders visible the (hidden) bonds of obligation in what have become extended and abstract networks of exchange, reciprocity, and redistribution. Our particular interest is in European (Union) law, which can be understood as the institutional backbone of a European society in the making, and our specific focus is on the transnationalisation of debt and solidarity, which holds this society together but which may also tear it apart.

More specifically, our conceptual framework draws on the economic sociology of law, which deals with the interconnections between law, economy, and society. In capitalist societies, market exchange plays a pre-eminent role, which has led some scholars to speak of a ‘market society’. Turning to the law, one can claim that law ‘constitutes’ the market society. Modern markets rest on ‘dogmatic foundations’: private property, free contract, and legal personhood, which are all ‘legal fictions’, as are the ‘fictitious commodities’ of land, labour, and money (or capital), the main production factors of capitalist enterprise. In this special issue, our main concern is with the role of the law in both in the commodification of debt and in the institutionalisation of solidarity in a European society in the making, which we consider a prototype of a transnational market society.

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18 In a market society, the institution of markets dominates ‘the whole organization of society, [which] means no less than the running of society as an adjunct to the market’; K. Polanyi, The Great Transformation (Beacon Press, 1944), at 57.
Debt relations are ubiquitous, and were so already in pre-capitalist times. The moral and legal relevance of debt relations can be seen in the distribution of rights, risks, and responsibilities between creditors and debtors. Throughout history, debtors have defended their rights and livelihoods in the form of debt riots, which are, of course, a rather extraordinary means to redress the balance between creditors and debtors. In ordinary times, debt default is regulated by law (private or public), which ideally institutionalises the prevailing morality. Schematically, one can distinguish between two opposed normative principles marking the poles of creditor protection (caveat debitor: let the debtor beware) and debtor protection (caveat creditor: let the creditor beware). In the market society, debt has become an objective legal relation and a tradeable economic commodity. In its commodified form, debt circulates in networks of market exchange and may easily cross borders. Whereas the commodification and securitisation of debt fulfils an important function in contemporary capitalist societies, it can also be taken too far, as shown by the ‘excesses of financialisation’, which triggered the recent financial crisis.

Etymologically, the origin of the notion of solidarity is likewise a debt relation. In Roman law, the Latin term *solidum* referred to ‘[a] thing in its entirety, a whole, a sum due as a whole’. In turn, *in solidum obligare* refers to a relation of joint and several liability of two or more debtors *vis-à-vis* their creditor: ‘Each of several joint-debtors may be compelled to pay the whole or any part of the debt. The creditor may sue any one of the joint-debtors for the whole or any part of the debt […]; but he cannot be compelled so to divide his claim, even if all the joint-debtors are solvent.’ This legal construct of solidarity is still preserved in the French notions of *solidité* and *solidarité* of the mid-eighteenth century; and it is only

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21 D. Graeber, *Debt: The First 5000 Years* (Melville House, 2011); Fontaine, above, n. 11.
22 Graeber, above, n. 21, at 8.
24 Juutilainen, this issue.
after the French revolution, that the term solidarity was given a new, political meaning.\textsuperscript{27} Today, it can be discussed whether solidarity indeed requires a relatively ‘solid’ social collective, as in national welfare states,\textsuperscript{28} or whether it can also take the more flexible character of a transnational ‘network solidarity with open ends’.\textsuperscript{29} The question whether mutual liability should exist within the European community of debt or limited liability of creditor states with regard to debtor states was and is highly controversial.\textsuperscript{30}

II. Historical background: European financial and monetary integration

In this special issue, we focus on the transnational network of debt relations and commitments of solidarity arising out of the European economic constitution: the legal and constitutional framework of the European integration process, whose core project has always been economic integration. Tuori and Tuori distinguish between ‘the microeconomic constitution, centred around free movement and competition law and introduced by the Treaty of Rome (1958), and the macroeconomic constitution, centred around aggregate economic objectives and economic policies, and introduced by the Treaty of Maastricht (1993)’.\textsuperscript{31} Even though we lay emphasis on the economic, and not the political, constitution, we do not mean to put forward an ordoliberal reading of the integration project. While ordoliberalism did have a formative influence on its development, the European economic constitution is fraught with tensions, allows for different readings, and remains subject to contestation.\textsuperscript{32}

\begin{thebibliography}{9}
\bibitem{28} Ferrera, this issue.
\bibitem{30} Dyson, above, n. 1, at 584-585. Dyson frames this as a problem of matching liability and control and aligning rights and responsibilities; ibid., at 240.
\bibitem{31} Tuori and Tuori, above, n. 8, at xii; for a critical review, see C. Joerges, “‘Brother, Can You Paradigm’”, (2014) 12 International Journal of Constitutional Law, 769-785, at 772-775.
\bibitem{32} See, for a classic piece on the microeconomic constitution, M. Pioares Maduro, We The Court: The European Court of Justice and the European Economic Constitution – A Critical Reading of Article 30 of the EC Treaty (Hart Publishing, 1998) and, for a more recent comment on the macroeconomic constitution, C. Joerges, ‘Europe’s Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation’, (2014) 15 German Law Journal, 985-1027.
\end{thebibliography}
On the most general level, our claim is that the European economic constitution has acted as a catalyst of the transnationalisation of debt and solidarity around the projects of the internal market and monetary union. To simplify, we will speak of the microeconomic constitution of the internal market and the macroeconomic constitution of monetary union. While the recent crisis brought the macroeconomic constitution to the fore, the integration process was long dominated by the microeconomic constitution. It would be more precise to say, though, that the integration process rested, at its outset, on a different macroeconomic constitution, which was not fully ‘Europeanised’.

Again, the turning point can be seen in the liberalisation of capital movements.

To lay the ground for the following sections, which specify the analytical framework of this special issue and contextualise the individual contributions, it is worthwhile to briefly recap the processes of financial and monetary integration that furthered the transnationalisation of private and public debt and put constraints on national economic and social policies. This requires, first, defining what we mean by financial and monetary integration. Financial integration refers, according to a common textbook, to the integration of financial markets by furthering the free movement of capital, including money and financial capital as well as direct investments, and the free movement of financial services, including banking, insurance and investment services. By monetary integration, we refer to the integration of monetary policies and the introduction of the euro, which is premised on close coordination of national fiscal and economic policies. Our intention is not to exclusively focus on financial and/or monetary integration, but to emphasise the links between them and their implications for the European polity as a whole.

The Treaty of Rome, the founding document of the European Economic Community (EEC), was lacking a distinctive monetary constitution, albeit it did aim for balanced trade, which has implications for the balance of payments. Formally, the provision of monetary stability was left to the Member States and macroeconomic coordination was largely voluntary: ‘[t]he most far-going Community competences concerned Member States’ exchange-rate policy.

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33 Combining internal and external elements: the European Payments Union, and later the European Monetary Agreement, on the one hand, and the system of Bretton Woods on the other. For more on the latter, see below.
34 J. Pelkmans, European Integration: Methods and Economic Analysis (Prentice Hall, 2nd edn, 2001), at 125 and 162.
and their balance of payments’, which were considered matters of ‘common concern’. Most importantly, however, economic integration initially proceeded under the premise of the fixed exchange-rate system of Bretton Woods, which was introduced after the Second World War and remained in place until the early 1970s. Hence, one could say that the international currency system supplemented the European economic constitution in its external, macroeconomic dimension.

At the same time, the free movement of capital was only ‘depicted as an aspirational goal’ in the Treaty of Rome, with the assumption being that attainment of this goal was premised on political integration. In practice, for the first few decades of the integration process, capital mobility remained accessory to the other economic freedoms: the free movement of goods, services, and workers. Under conditions of limited capital mobility, Member States could engage in macroeconomic steering without fearing sanctions by ‘volatile’ financial markets, such as capital flight or speculation. To put it differently, the role of international finance was still contained.

This changed, most visibly, with the exponential growth of the so-called Euromarkets in the 1960s and 1970s: ‘offshore’ markets for US dollars. Under the gold-dollar exchange standard of Bretton Woods, the US dollar had become the world’s main reserve currency. This increased the demand for US dollar deposits outside the United States, which was first satisfied by banks in the City of London, under permissive regulatory conditions. The increasing scope of transactions in the Euromarkets, which were not restricted to Europe, nor to transactions in US dollars, undermined the control, or management, of exchange rates by national central banks and thus ‘undoubtedly represented one nail in the coffin of the Bretton Woods fixed-exchange-rate scheme’. However, it has also been argued that the inherent shortcomings of the gold-dollar exchange standard made its collapse ‘predictable’, as it ‘relieved in fact – even though not in law’ the USA from having to adjust its own balance of payments.

35 Tuori and Tuori, above, n. 8, at 20; cf. Art. 107 of the Treaty establishing the European Economic Community, signed on 25 March 1957.
With the breakdown of the Bretton Woods system, the deregulation of finance, which is, properly speaking, a move towards ‘market-conforming regulation’, gained momentum: it ‘accelerated in the 1970s and became the norm in the 1980s’.\textsuperscript{40} This is most evident in the liberalisation of capital movements, which was first advanced on the unilateral level by EEC member states such as Germany (1961), the United Kingdom (1979), and the Benelux countries (1980; between each other). In the wake of the Single European Act (1987) the free movement of capital was put on an equal footing with the other economic freedoms.\textsuperscript{41} Directive 88/361 projected a fully liberalised European capital market by 1992.\textsuperscript{42} Importantly, this included an \textit{erga omnes} extension of capital mobility with regard to third countries, which meant that ‘European financial integration would imply the embrace of global capital flows’.\textsuperscript{43} In the Treaty of Maastricht, the free movement of capital was finally constitutionalised and given direct effect.\textsuperscript{44}

After the end of Bretton Woods, efforts focused on creating a similar monetary system on the European level to provide for exchange-rate stability. In the 1970s, some countries experimented with the European ‘currency snake’.\textsuperscript{45} In 1979, the European Monetary System (EMS) was established.\textsuperscript{46} Both initiatives were taken outside the Treaty framework. However, the ‘impossible trinity’ of full capital mobility, fixed exchange rates and autonomous monetary policy seemed to force the Member States to move towards a fully-fledged economic and monetary union.\textsuperscript{47} In fact, the EMS was exposed to speculative attacks

\textsuperscript{40} C. Lapavitsas, \textit{Profiting Without Producing: How Finance Exploits Us All} (Verso, 2013), at 311-312.
\textsuperscript{41} See Art. 13 of the Single European Act, signed on 17 and 28 February 1986.
\textsuperscript{44} See Art. 73 of the Treaty on European Union, signed on 7 February 1992. Now Art. 63 TFEU.
\textsuperscript{46} Agreement between the central banks of the Member States of the European Economic Community laying down the operating procedures of the European Monetary System, Basle, 13 March 1979. Cf. James, above, n. 45, at 178-179.
and ran into terminal crisis in 1992, shortly before the Maastricht Treaty entered into force.\textsuperscript{48} Under the premise of the free movement of capital, financial integration thus entailed monetary integration.

III. Integrated capital markets: Transnationalisation of private debt

With the liberalisation of capital movements, the integration process changed its logic. Financial integration within the EEC and with regard to third countries got intertwined with the globalisation of financial markets, the re-emergence of international finance, and the financialisation of capitalism.\textsuperscript{49} Financialisation here refers not only to the availability of new financial technologies (or the creation of ‘synthetic’ financial products on the basis of more conventional debt relations) but, more generally, to a ‘transformation of advanced capitalist economies’ in the course of which banks, non-financial enterprises, and households have become increasingly involved in the logic of finance.\textsuperscript{50} The nexus between the European economic constitution and the regime of financialised capitalism, which emerged in the Anglo-Saxon world (first of all in the USA and the UK), but which also implicated countries in continental Europe,\textsuperscript{51} became evident in the recent crisis, which has been interpreted as a ‘crisis of financialisation’.\textsuperscript{52} However, the normative framework, on which this regime rests, was also made in Europe.\textsuperscript{53} In the light of the constitutive role of the EU in ‘juridifying’ the free movement of capital, Menéndez even suggests that ‘[w]hile the driving economic forces in the process of financialization had been US financial institutions, the driving legal force was the European Union’.\textsuperscript{54}

\textsuperscript{50}Banks have turned from relationship-banking to investment banking practices, non-financial enterprises have increased their activities in financial markets, and private households have started to accrue more financial liabilities and assets; Lapavitsas, above, n. 40, at 15; cf. M. Sawyer, ‘What Is Financialization?’, (2013) 42:4 (Winter) \textit{International Journal of Political Economy}, 5-18.
\textsuperscript{52}Lapavitsas, above, n. 40.
\textsuperscript{53}Abdelal, above, n. 43.
\textsuperscript{54}Menéndez, above, n. 36, 489.
This section starts from the fact that the present European crisis was triggered by a financial crisis, which ‘originated in private credit relations and securitisation’ in increasingly integrated capital markets on the European as well as on the global level. Crouch points to ‘the growth of credit markets for poor and middle-income people, and of derivatives and futures markets among the very wealthy’, which came to feed the ‘Anglo-liberal growth model’ but also left traces in other socio-economic regimes. Within the highly interdependent global financial system, the crisis travelled from continent to continent, from banks to states, from financial derivatives to the common currency. What began as a US subprime mortgage crisis turned into an EU sovereign debt crisis. Focusing on the transnationalisation of private debt, our aim in this section is to investigate the role of the law in the commodification and securitisation of private debt relations, and to explore alternative regulatory options against the backdrop of the recent financial crisis.

Analytically speaking, the European community of debt in its ‘deepest’ layer rests on a network of debt relations between private actors (including business as well as consumers), which reaches far beyond Europe, but whose regulation is also a matter of European concern. The integration of capital markets is premised on ‘law-based’ commodification of debt, which improves the tradeability of claims across borders. In financialised capitalism, debt commodification includes the securitisation of debt through ‘objectification and abstraction of risk’. This means that the specific risk, say, of providing home mortgages to a clientele with little income and no assets, is ‘detached from the social context that created the risk and the relations in which it is immersed’ and transformed into a ‘universal type’ of risk, which can be priced and traded in derivatives markets without knowing, or having to know, all the details.

Law affects the distribution of rights and responsibilities in debt relations between private actors, emphasising either creditor or debtor protection. Moreover, in fulfilling its ‘social

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57 C. Hay, ‘Pathology Without Crisis? The Strange Demise of the Anglo-Liberal Growth Model’ (2011) 46 *Government and Opposition*, 1-31. Hay and Wincott note that there was ‘no simple one-to-one correlation between welfare regime cluster and growth model’; Hay and Wincott, above, n. 9, at 201.
58 Juutilainen, this issue.
60 Ibid., at 414.
function’, law also mediates between public and private interests. Economically speaking, law determines to what extent private actors may ‘externalise’ the risks and costs of a potential debt default. The ambiguities of this so-called ‘moral-hazard’ argument, which has become very prominent in public discourse, can be illustrated by contrasting the ‘too big to fail’ of insolvent banks with the ‘never too small to fail’ of insolvent consumers in the context of the mortgage crisis in the USA but also in several states of the Eurozone, including Spain. While the question of ‘who benefits and who pays’ may be answered on the individual level, where a trade-off between creditors and debtors can be assumed, there is no easy response on the systemic level, where what is at stake is financial stability, which arguably benefits all.

In this section, we are interested as much in the transnationalisation of debt relations as in the transnationalisation of the law governing debt relations. The latter can be illustrated by the development of insolvency regimes across different countries. This development reveals not only differences between legal cultures – with some countries consistently being pro-creditor, others pro-debtor in orientation – but also ‘forces of global convergence’. This form of transnationalisation can be observed in corporate insolvency regimes as well as in consumer insolvency regimes. Hence, while some insolvency regimes can be considered more

creditor-friendly than others, such as those based on the ‘English’ common-law approach as opposed to the ‘French’ civil-law approach, one may also see an overall trend towards more debtor-friendly regimes, which gained momentum in the course of the recent financial crisis. In the case of consumer insolvency, inspiration is drawn from the ‘US-American’ approach of a relatively easy debt discharge, which ‘frees the debtor from the shackles of existing debt and places him on the economic treadmill once again – to earn, consume and borrow’. This so-called ‘fresh start’ policy reflects the needs of what Ramsay describes as ‘consumer credit capitalism’, which has its origins in the USA, but which is spreading on the European continent as well. The increase in privately-incurred debt and private insurance of risk is not least a result of the transformation of the welfare state, which we will turn to in the following section. Whereas the first contribution to this section highlights the role of law in the commodification of private debt, which facilitates the transnationalisation of debt relations, the second contribution turns to the regulation of mortgage contracts, which brings the social function of private law to the fore. Focusing on the European context, both articles contextualise recent legal developments, and explore options for law reform.

[‘Law-Based Commodification of Private Debt’ (Teemu Juutilainen)]

Juutilainen’s article defines the commodification of debt as a process in which debt transforms into a tradeable asset and acquires features of an exclusive and transferable property right. Law is constitutive in this process, which can be considered indispensable for a commercial society, but which may also lead to excessive financialisation. Against the backdrop of the classical understanding of debt as inalienable, the article retraces the


commodification of debt over two millennia: from its beginnings in ancient Roman law to the medieval *ius commune* and to modern national law. Three modes of debt commodification are identified, on which the transnationalisation of private debt rests: the ‘propertification’ of debt, the ‘impersonalisation’ of debt relations through standardisation, and processes of ‘risk abstraction’ enabling the securitisation of debt. While the historical account exposes the contingency of debt commodification, the analysis of its different modes points to the ambiguities of commodified debt as a legal and social institution. The analytical framework is applied to topical questions in the transnationalisation of private debt: cross-border assignment of claims and regulation of the European securitisation market. Both issues are taken up in the European Commission ‘Action Plan on Building a Capital Markets Union’, which seeks to improve the conditions for a truly integrated capital market in the EU. As Juutilainen concludes, the analytics of debt commodification helps to gain a broader and more differentiated perspective on the risks and benefits of future law-making in these fields.

[‘Mortgage Debt and the Social Function of Contract’ (Irina Domurath)]

Domurath’s article deals with the legal implications of a phenomenon that feeds into the transnationalisation of private debt: the expansion of consumer credit and, more specifically, the promotion of home mortgages as a means to improve consumer welfare. The proliferation of consumer credit capitalism is fuelled by a transformation of the welfare state from providing public goods and services to facilitating their provision in private markets. Hence, instead of offering public housing, private home-ownership is advanced. Under these conditions, the social function of private law is emphasised, or the need for a fair distribution of rights, risks and responsibilities between (commercial) creditors and (consumer) debtors. It is argued that the EU has adopted the idea of financial inclusion through access to credit but that it has not adapted its conception of contracts accordingly. Whereas the traditional model of contract law is characterised by a formalistic understanding of contracts as punctual agreements which have to be observed as they were concluded, the cooperative model emphasises the relational dimension of contracts, which may allow for an adjustment of obligations in the case of unforeseen events. The article shows that EU mortgage law still adheres to a rather formalistic conception of contract law which leaves little room for

adaptation, and that the emphasis on procedural fairness in recent CJEU case law is likewise insufficient to ensure a fair allocation of (market) risks. In the recent financial crisis, this led to a dramatic surge in mortgage defaults and evictions.

IV. Interdependent welfare states: Transnationalisation of solidarity

In the early decades of the integration process, the European economic constitution still preserved the monetary autonomy of the Member States and their right to control capital mobility. The ‘embedded liberalism’ of the postwar era\(^\text{74}\) allowed Member States to engage in macroeconomic steering. This was one of the key features of the so-called ‘Keynesian welfare national state’, which had its heyday between the 1950s and 1970s, and whose overall aim was to ‘promote full employment in a relatively closed national economy primarily through demand-side management, and to generalize norms of mass consumption through welfare rights and new forms of collective consumption.’\(^\text{75}\) In broader terms, one can speak of ‘welfare capitalism’. This refers to a socio-economic regime that integrates the functions of a capitalist market economy, which builds on civil rights, namely property rights, with those of a democratic welfare state. This in turn lays emphasis on political and social rights.\(^\text{76}\) Simply put, welfare capitalism reconciles the interests of ‘capital’ and ‘labour’.\(^\text{77}\) The institutionalisation of collective bargaining in a (state-supported) system of industrial relations was a response to the social question raised by the industrial revolution, the social repercussions of economic integration under the gold standard, and the Great Depression.\(^\text{78}\) With the end of Bretton Woods, the liberalisation of capital movements, and the rise of global finance, the institutional preconditions of welfare capitalism fundamentally changed. This


\(^{77}\) Pierson, above, n. 15, at 1518-1519.

\(^{78}\) Polanyi, above, n. 18.
does not mean that the welfare state ceased to exist, but it underwent deep transformations.

This section is concerned with the transformation of welfare capitalism in the European context and explores in what ways the EU is either complementing or challenging national welfare states. The underlying assumption is not that the transformation of welfare capitalism is caused by the process of European integration but that it is interrelated with that process. We will first give a general account of recent developments and then turn, more specifically, to the European context. To avoid the impression that our concern is with social spending only, we will speak of the transformation of the national tax state on the one hand and of the national welfare state on the other. These are but two sides of the same coin: the revenue side and the expenditure side of welfare capitalism. Debt enters the picture on both sides. On the revenue side, one can refer to the late 20th-century ‘fiscal crisis of the state’, which was ‘caused less by an increase in citizen entitlements than by a general decline in the taxability of democratic-capitalist societies.’ The mismatch between government revenue and government spending resulted in increasing public debt, which turned the tax state into a ‘debt state’, and ultimately into a ‘consolidation state’, which seeks to solve the fiscal crisis ‘not by raising revenue but by cutting expenditure’. On the expenditure side, in turn, one can witness a paradigmatic shift ‘from welfare to workfare’ but also ‘from welfare to debtfare’. Formerly unconditional welfare benefits have become contingent on the activation of welfare recipients in the labour market. At the same time, the reduction of public demand and consolidation of public debt seems to be compensated at least partially by an increase of private debt, which includes the activation of consumers in the credit market. This is referred to as ‘privatised Keynesianism’: ‘Instead of governments taking on debt to stimulate the economy, individuals did so.’ The transformation of welfare capitalism is thus

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82 Ibid., at 2-3 and 10.
85 Frerichs, above, n. 76, at 148.
86 Crouch, above, n. 56, at 390.
linked with the expansion of private debt relations, which we were concerned with in the previous section.

Our main interest in this section is the ‘Europeanisation’ of welfare capitalism, or how the tax and welfare regimes of the Member States have become interlinked through processes of European integration. As Hay and Wincott point out, the integration project has come to affect national fiscal and social systems in various ways: ‘by constructing EU-level institutions, by regulating and in the process reshaping European states, and through economic as well as social policies’.  

Since the Member States have basically retained their right ‘to define the fundamental principles of their social security systems’, much attention has been given to the ‘open method of coordination’ as a form of ‘soft law’ or ‘new governance’, the aim of which is to bring about more convergence between Member State social policies.  

As Trubek and Trubek note, this project was spurred by ‘[t]he creation of a truly integrated market and a common currency [which] led to a new context for social policy, generating new constraints, creating new interdependencies [recte], and setting the stage for enhanced EU involvement’. So once again it all comes down to developments in the micro- and macroeconomic constitution. In this section, our guiding question is not how national social policies are coordinated by soft law in this specific policy field but how they are conditioned by hard law in other policy fields.

While it would be worthwhile looking at how Member State social policies are restricted by the fiscal rules of the reformed monetary union in general, and by the conditionality of structural adjustment for Member States receiving financial assistance in particular, the three articles included in this section are concerned with the effects of internal market law, namely free movement rights, which have an impact on both the revenue and the expenditure side of national welfare regimes. The specific angle from which we analyse the role of free movement in furthering ‘welfare state interdependencies’ is the transnationalisation of solidarity, which can be understood as either corrosive or constructive. Whereas the first

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87 Hay and Wincott, above, n. 9, at 131
88 Art. 153(4) TFEU.
89 Trubek and Trubek, above, n. 6.
90 Ibid., at 345.
91 Hay and Wincott, above, n. 9, at 132-133.
92 C. de la Porte and E. Heins (eds.), The Sovereign Debt Crisis, the EU and Welfare State Reform (Palgrave Macmillan, 2016).
93 Trubek and Trubek, above, n. 6, at 345.
94 Undermining existing communities of solidarity or creating new networks of solidarity, *de facto* and *de jure*. 

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contribution to this section addresses the expansion of the free movement of capital and establishment, the other two contributions deal with the free movement of workers and persons. In both fields, free movement has an effect on the ‘constituency’ of national welfare states: not by exercising voting rights, but by entering or exiting their fiscal and social systems as (potential) taxpayers and beneficiaries. This entry/exit option goes to the heart of the social contract, which determines who owes what to whom in a national – or transnational – community of solidarity.

[‘Economic Mobility and Fiscal Federalism: Taxation and European Responses in a Changing Constitutional Context’ (Jukka Snell and Jussi Jaakkola)]

Snell and Jaakkola’s article reassesses the Europeanisation of the tax state through tax competition, on the one hand, and tax harmonisation, on the other. Whereas the former is furthered by the free movement of capital and the right of establishment, the latter is a matter of political decision-making on the European level. As in other EU policy fields, negative integration (‘integration through the removal of tax obstacles’) is more advanced than positive integration (‘integration through tax harmonisation’).95 The question motivating this article is whether the EU can move from a state of fiscal interdependence, which erodes Member State capacity to tax, to a system of fiscal federalism, which would collectively restore it. This requires calibrating intergovernmental tax sovereignty with transnational tax solidarity. What Snell and Jaakkola find is that recent judicial, regulatory and political developments on the European level point in the right direction. The CJEU has become more accommodating with regard to the tax autonomy of Member States by revising its notions of restriction on economic freedoms and justifications of respective limitations. The Commission increasingly targets state aid investigations as harmful forms of tax competition. And new legislative initiatives are aimed at the harmonisation of corporate tax systems, the introduction of a tax on financial transactions, and tax-related information exchange. Moreover, it is argued that the enlargements of the EU in the 2000s and the Eurozone crisis in the 2010s have increased the legal possibilities as well as political willingness to engage in collective action in tax matters.

Ferrera’s article deals with problems related to the Europeanisation of the welfare state, starting from a ‘thick’ conception of solidarity, which supposes a high degree of social integration, unity and cohesion in a given social collective. As a prototype of highly ‘organised’ or ‘institutionalised’ forms of solidarity, the national welfare state was premised on a balancing act between ‘opening’ and ‘closure’, that is, the generalisation of social security arrangements to a wider, national collective, and the avoidance of what Ferrera refers to as ‘redistributive stretching’: the overextension of solidarity claims beyond what seemed workable and acceptable at a given point in time. The question of membership, or who can join (national) social security schemes, is also key in the transnationalisation of solidarity. As opposed to cross-national solidarity, which refers to financial transfers or the pooling of resources between EU Member States, transnational solidarity refers to the relations between citizens: non-mobile national citizens and mobile EU citizens, and more precisely, to the willingness of the ones to share ‘their’ place and welfare arrangements with the others. Making a case for political realism, the article suggests taking the normative ambitions of EU citizenship down a notch for the time being. Instead of insisting on the legal and moral principle of non-discrimination against national populations which have become increasingly reluctant to admit foreigners, the suggestion is made to follow the principle of hospitality, which would give Member States more autonomy in defining access to national communities of solidarity.

The article by Sankari and Frerichs takes a closer look at the form of solidarity implied by EU citizenship law, which is here framed as (transnational) solidarity with strangers. Solidarity with strangers refers to the opening up of national welfare systems to mobile EU citizens from other Member States. As a legally organised form of solidarity, it undergirds the free movement of workers and other ‘economically active’ persons and, to a lesser extent and subject to certain conditions, it also supports the mobility of other, ‘economically non-active’ persons, such as students, pensioners, or the unemployed. Drawing on a terminology originally used to qualify the development of social rights in national welfare states, the
evolution of EU citizenship law is reconstructed in terms of the ‘commodification’ or ‘decommodification’ of European social rights. Whereas in the first phase of the integration process, transnational solidarity was confined to economically active EU citizens, it later came to be extended to certain groups of economically non-actives. In recent years, however, a process of ‘recommodification’ seems to be occurring in the sense that access to national welfare systems for economically actives and non-actives alike is becoming more conditional on fulfilment of (overt or covert) economic requirements. In a political climate aggravated by Brexit, even the social rights of mobile workers seem no longer exempt from re-evaluation in terms of whether they are justified by a sufficient ‘link of integration’ to the host society and whether potential benefit claims can be considered an ‘unreasonable burden’ on national welfare systems.

V. Reform

Financial and monetary integration culminated in the Maastricht Treaty. This not only constitutionalised the free movement of capital, including its *erga omnes* extension with regard to third countries, but also established a fully-fledged monetary constitution for what has become the Eurozone, now consisting of 19 out of currently 28 (and after ‘Brexit’ 27) EU Member States. In sociological terms, the common currency has been pictured as a bond that unites as well as a bond that subjects. The former vision is premised on a continuation of welfare capitalism on the European level, with the Euro adopting the same ‘dual economic and political nature’ as national currencies, which had become a symbol of the ‘compromise between private economic players and the public political players’. Under these conditions, a common currency would indeed represent a ‘community of debt’ which is not held together by economic, or commercial, debt only but also by ‘social debt’. In general terms, the latter can as much be understood as what we owe to society, on which we depend for our lives, as what the state owes to its citizens, e.g., civil, political, and social rights. In this

97 Lapavitsas, above, n. 40, at 289.
99 Théret, above, n. 96, at 60.
100 Ibid., at 71.
101 Ibid., at 63-64; cf. Graeber, above, n. 21, at 43-71.
sense, ‘community of debt’ is, from a monetary perspective, but another term for the modern social contract as it developed in the course of the twentieth century. However, it is open to question whether the euro could develop the same unifying force identifying a (new) political community as its predecessors on the national level.

Instead, critics point to the hegemonic logic of the common currency, which has been ‘designed to serve the interests of large financial, industrial and commercial capital in Europe as well as the interests of the most powerful states within the European Monetary Union’. A form in which this hierarchy appears is the division between creditor states and debtor states, which has increasingly become ‘institutionalised’ on the European level. The political logic of the common currency is linked to its economic logic, which is occasionally depicted in analogy to the idea and functioning of the gold standard. In its classic form, the gold standard was conceived as a ‘self-regulating mechanism of supplying credit’. This means that, ideally speaking, an imbalance of payments between two countries was settled by gold movements, which would affect the domestic credit supply. Under these conditions, maintaining gold parity was considered paramount. With the gold-dollar exchange standard of Bretton Woods, the link to gold became indirect for most participating currencies, and it was ultimately suspended also for the US dollar. Today, most currencies of the world are ‘fiduciary’ in that their value ultimately rests on a ‘promise to pay’ backed by the state’s taxation powers. Domestic credit supply is managed by central banks according to actual or projected demand for credit in the country. However, in the monetary union, the idea is, once again, that liberalised ‘capital markets would regulate trade deficits automatically’ and that ‘lending could flow based only on credit risk’. This was to be guaranteed by the European Central Bank (ECB), whose ‘independence […] has a stronger legal foundation than the

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102 Under the premise of welfare capitalism, this implies ‘that a central monetary system enjoys legitimacy only if it is part and parcel of the democratic institutions created to offset the free play of private property rights, through society’s recognition of a primordial debt vis-à-vis everyone’; Théret, above, n. 96, at 71.


104 Losada, this issue; Dyson, above, n. 1.


107 Wilsher, above, n. 4, at 248.
independence of national central banks’. Yet, in the crisis, the ECB has arguably gone beyond its restricted monetary-policy mandate by making ample use of ‘non-standard’ measures to restore financial stability in the Eurozone.

This section focuses on the implications of the Economic and Monetary Union (EMU) and the Eurozone crisis for debt relations between public actors, namely the Member States. In the history of public debt, the formalisation of debt relations was a crucial step in developing the impersonal ‘fiscal state’: What had been ‘personalized borrowing by rulers’ came to be replaced by the ‘professionalization of public finances’ in a rational-bureaucratic organisation. However, despite the increase of impersonal debt relations, the assessment of sovereign creditworthiness may still be shaped by particular bonds, such as between certain banks and governments, and not by anonymous market forces only. A more specific trend is the ‘formalization of creditor-debtor state relations’, that is, the relations between creditor states (and not just private creditors) and debtor states, ‘around agreed institutional arrangements and rules of the game’. Such arrangements include the classic gold standard as well as the Bretton Woods currency system and now European monetary union. However, the formalisation of creditor-debtor state relations in international and European law, which gained momentum after the Second World War, does not necessarily mean that the power asymmetries between creditor and debtor states would be resolved and that problems arising from these debt relations would be addressed on equal terms.

As a ‘stateless currency devoid of a coherent sovereign power’, the euro seems particularly suited to accentuate the ‘laws of the market’. In this sense, albeit not linked to commodity money (like gold or silver), the common currency is relatively ‘commodified’, or what is the same, its conditions and functioning are depoliticised. The euro has to prove its value, or its credibility as a common currency (which includes the sovereign creditworthiness of the Member States of the Eurozone), first of all on international financial markets. Indeed, one of

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110 Tuori, this issue; cf. Wilsher, above, n. 4.
111 Dyson, above, n. 1, 323.
112 Ibid., at 99.
113 Ibid., at 19 and 323.
114 Ibid., at 564.
115 Losada, this issue; Dyson, above, n. 1, 579.
117 Thomasberger, above, n. 105.
the tasks of the legal framework of the monetary union is to further market discipline, which can be defined as ‘the mutual responsiveness of financial markets and sovereign borrowers’\cite{118} and in practice often results in ‘the private governance of public debt’\cite{119} by national banks, credit agencies, and institutional investors. From the very inception of the monetary union, generation of market discipline has not been left to the markets only. Instead, ‘market-induced discipline was complemented by institutional, Union-level means.’\cite{120} These disciplinary means crystallised in the Stability and Growth Pact, which was launched in 1997 and reformed several times, most recently during the crisis. Decision-making within the present regime is characterised by a combination of ‘highly centralised supranational intervention […] with intergovernmental control of key political decisions.’\cite{121}

The first contribution to this section documents the institutionalisation of creditor-debtor state relations in the European monetary regime, including reinforced mechanisms of economic governance, which are meant to secure budget discipline. The second contribution provides an in-depth analysis of the ways in which crisis management by the ECB may not only have turned private debt into public debt but also substituted for the mutualisation of public debt in the form of hidden transfers. Both articles illuminate, from different angles, the question of who owes what to whom in today’s European community of debt. As the previous sections have shown, public debt relations are only the tip of the iceberg which ultimately rests on private debt relations.

[‘The Institutional Implications of the Rise of a Debt-based Monetary Regime in Europe’ (Fernando Losada)]

Losada’s article retraces the formalisation of creditor-debtor state relations in the European legal framework from the beginnings of the integration process until today. The article builds on the assumption that the Eurozone crisis made more explicit the ‘underlying patterns’ of these debt relations, which had influenced European politics even earlier.\cite{122} More generally, the focus is on external debt, that is, state liabilities to foreign creditors, be they private or public, which both have a role in the transnationalisation of public debt. The main claim is

\begin{itemize}
  \item \cite{119} Dyson, above, n. 1, at 19, 240 and 356.
  \item \cite{120} Tuori and Tuori, above, n. 8, at 48.
  \item \cite{122} Dyson, above, n. 1, at 23.
\end{itemize}
that, in the (reformed) monetary union, power asymmetries between creditor and debtor states were translated into procedural rules and substantive norms, which override the principle of equality between Member States and challenge the cooperative nature of the integration process. The historical reconstruction starts from the founding treaties, which did not yet contain an agenda of financial and monetary integration, but relied for monetary stability on the Bretton Woods system, while capital mobility was still contained. With the end of Bretton Woods, the liberalisation of capital movements, and the emerging monetarist consensus, the external preconditions for the integration process changed. Power relations between international creditors and debtor states first became evident in the international monetary order before they came to shape the European monetary union as well. What can be observed since the beginning of the Eurozone crisis is an increasing codification of creditor interests. This may go at the expense not only of legitimate interests of debtor states but also of more collaborative ways of reducing macro-economic imbalances.

[‘Has Euro Area Monetary Policy Become Redistribution by Monetary Means? “Unconventional” Monetary Policy as Hidden Transfer Mechanism’ (Klaus Tuori)]

Tuori’s article analyses the management of the Eurozone crisis by the European system of central banks from a legal and economic perspective. The legal analysis is guided by the question whether the Eurosystem has exceeded its original mandate, which is confined to maintenance of price stability, and perhaps even compromised its stipulated independence by undertaking a variety of ‘unconventional’ monetary policy measures to contain the crisis. The economic analysis addresses the question whether these measures, which amounted to large-scale interventions in the market mechanism of capital allocation (even though they were also meant to cure market failure and prevent the fragmentation of integrated capital markets), yielded significant distributive effects in the Eurozone. In this case, these unconventional policy measures could be depicted as a hidden transfer mechanism. Such ‘mutualisation of responsibilities by monetary means’ is documented for the refinancing operations of the Eurosystem, which provided liquidity to banks via the interbank market on unusually permissive conditions, as well as its government bond purchasing programmes, which improved the conditions for public borrowing in the market for debt securities. These interventions helped not only banks and government in debtor states but they also benefited (their) private creditors and investors, both at the expense of European taxpayers, who assume the accumulated risks. While these distributive effects have already materialised,
imbalances in the system for monetary payments and the issuance of banknotes between creditor and debtor states would only result in substantial losses in the case of a breakup of the Eurozone.

VI. A tentative synthesis: Tying up the European community of debt

Dyson’s monumental *States, Debt, and Power* not only aims to show how debt relations played an important role ‘in shaping the character of European states and the European integration process’, but also to demonstrate how the recent crisis only accentuated ‘unresolved tensions between the old and new elements in European economic governance’: an intergovernmental logic of (largely informal) power relations between creditor and debtor states and a supranational logic of the formalisation of debt relations ‘on the basis of collective institutional structures to support banking, fiscal, and monetary union’. Similar to Dyson’s study, this special issue points to the moral underpinnings of (legal and economic) debt relations, or the question of what we owe to each other in the European polity of today. While Dyson’s book ‘seeks to make the case for a historically-minded political economy’, this special issue takes the European community of debt as a starting point for a sociologically-minded study of debt relations, which turns to the law – namely European law – as an indicator of transnational solidarity, whose scope and limits remain an object of contestation.

According to a classic argument that intrigues sociologists and lawyers alike, the rather abstract form of solidarity which characterises modern societies rests as much on legal rules as on economic exchange. More precisely, ‘material’ and ‘moral’ bonds reinforce each other. Solidarity may thus ‘grow’ with the division of labour. While this first was the case within national societies, which thus came to be unified, it can in principle also be assumed for a European society in the making. Ideally speaking, ‘solidarity among strangers’ would

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123 Ibid., at 12.
124 Ibid., at 585.
125 Ibid., at 564.
126 Cf. ibid., at 66.
127 Ibid., at 35.
128 In Durkheim’s terms, this is referred to as ‘organic solidarity’ as opposed to ‘mechanic solidarity’; see Durkheim, above, n. 16.
129 Ibid., at 218.
thus only be taken one step further: extending it from the national to the European level.\textsuperscript{130} However, the potential of a Europeanised solidarity to supplant the ‘organised’ solidarity of national welfare states is contested.\textsuperscript{131} To illustrate this, one may contrast the relative ‘solidity’ of bonds based on national citizenship with the relative ‘fluidity’ of transnational bonds based on free movement rights.\textsuperscript{132} Moreover, a given degree of welfare state interdependence, or what one could term transnational solidarity \textit{de jure} and \textit{de facto},\textsuperscript{133} referring to the existing European legal framework and its actual economic effects, is not always reflected in a concomitant development of popular feelings of solidarity, or what one could term transnational solidarity \textit{de more}, referring to public acceptance of these welfare entanglements.\textsuperscript{134} One reason for a lack of identification with the present form of Europeanised welfare capitalism may be that it is ‘imposed from above’ (EU law), but has to be ‘implemented from below’ (Member State administrations).\textsuperscript{135}

Different notions of solidarity are also pointed out in Dyson’s account of the Eurozone crisis and the ensuing debate about institutional reforms. Accordingly, creditor states (and, presumably, their populations) favour an understanding of ‘solidarity as rule compliance’, or a ‘solidarity of [individual] effort’ to meet stipulated macroeconomic requirements, as opposed to an understanding of ‘solidarity as fair burden-sharing’, or a ‘solidarity of collective financial assistance’ in the case of severe imbalances and crises.\textsuperscript{136} The former reading emphasises the domestic responsibilities of debtor states in averting crises and undertaking reforms: ‘The post-2007 crises were represented as ‘home-grown’. They were the product of faulty financial and economic policies in debtor states that undermined their

\textsuperscript{130} Which means that already ‘the nation’ is not defined in ‘ethnic’ but in ‘civil’ terms; see J. Habermas, ‘Why Europe Needs A Constitution’, (2001) \textit{New Left Review} 11 (September-October), 5-26, at 15-16.

\textsuperscript{131} Frerichs, above, n. 29.

\textsuperscript{132} ‘Fluidity’ is here used in the sense of flexibility, not fugitiveness. For the former interpretation, see Münch’s notion of transnational solidarity as a ‘network of mutually dependent parts that might be more or less densely woven and open to including new specialised parts’; Münch, above, n. 29, at 521. For the latter interpretation, see Somek’s notion of ‘fluid organic solidarity’; A. Somek, ‘Transnational Solidarity: Organic or Proletarian?’\textsuperscript{133} available at: http://www.academia.edu/24546842/Transnational_Solidarity_Organic_or_Proletarian.


\textsuperscript{135} For a related argument, see H. Brunkhorst, \textit{Solidarity: From Civic Friendship to a Global Legal Community}, translated by Jeffrey Flynn (MIT Press, 2005), at 172: ‘The citizens of Europe have their rights, but they did not give them to themselves. So the solidarity of European subjects remains asymmetrical, secured from above, and hierarchically structured.’

\textsuperscript{136} Dyson, above, n. 1, at 254 and 288.
competitiveness and/or that led to unsustainable credit booms.' The latter reading, in contrast, emphasises the international dimension of the crisis and the collective efforts needed to attain more balanced economies: ‘The post-2007 crises were represented as stemming from trade and financial imbalances, from reckless lending from creditor states, and from the lack of symmetrical adjustment by creditor states.' The implications of these different readings regarding the engagement of creditor states in risk- and burden-sharing are clearly different.

One could argue that speaking of a European ‘community of debt’ instead of a European ‘community of credit’ lays more emphasis on the fault of debtor states than on the concomitant responsibilities of creditor states, and would thus leave little room for a more substantial understanding of solidarity. However, the conceptual framework of this special issue emphasises the distribution of rights and responsibilities in the institutionalised networks of exchange, reciprocity and redistribution that arise from, or are shaped by, the European economic constitution. Within that conceptual framework, the distinction between credit and debt as well as between debt and solidarity is encompassed by the broader notion of bonds of obligation between Member States, market participants, and European citizens. While the law regulating these relations serves as an indicator of a certain state of moral affairs, this also needs ‘unpacking’ as to who owes what to whom in a wider political-economic and historical-cultural context. The different sections of this special issue bring different types of relations of debt and solidarity to the fore: in ‘integrated capital markets’, ‘interdependent welfare states’, and the ‘reformed monetary union’. Studying the bonds of obligation in each of these spheres has a value in itself. However, to obtain a fuller picture of the European community of debt, the links between the different spheres are equally important.

With regard to debt relations, more narrowly understood, this requires comparing and connecting the distribution of rights, risks, and responsibilities between creditors and debtors in corporate debt, consumer debt, and sovereign debt. With regard to communities of

137 Ibid., at 579.
138 Ibid.
139 Ibid., at 41 and 639-640.
140 Thus Kenneth Dyson in the special issue workshop, above, n. 2, who made this argument against the backdrop of Keynes’ original ideas of an international credit union. Cf. Dyson, above, n. 1, at 576-577.
141 Cf. Block-Lieb, above, n. 71, who compares the rationale of restructuring sovereign debt, corporate debt, and consumer debt and studies the evolving international consensus on regulatory standards in these fields.
solidarity, one could think of different organisational levels of redistribution: national, transnational, and supranational. Streeck distinguishes between Staatsvolk (state people) and Marktvolk (market people), which describes the different constituencies of the ‘debt state’: national citizens and voters on the one hand and international creditors and investors on the other. Against this backdrop, a ‘consolidation state’ is depicted as ‘one whose commercial market obligations take precedence over its political citizenship obligations’. In short, given the transformation of welfare capitalism, communities of solidarity are conditioned by networks of debt. The national social or fiscal contract is undermined by market forces, which are embodied in the right to free movement of goods and services, but also of factors of production.

In this special issue, the link between interdependent welfare states and integrated capital markets was specified as a move from public debt to private debt and, relatedly, from social citizenship to ‘financial citizenship’. In practice, this means a ‘privatisation’ of the social contract by trading off the rights of beneficiaries of the welfare state against the rights of consumers of financial services, and imposing more conditions on welfare recipients while giving more leeway to consumer debtors. As Domurath’s article shows, the adaptation of private law to the new paradigm of ‘financial inclusion’ is still incomplete. Another trade-off that results from free movement rights and the concomitant Europeanisation of welfare capitalism privileges ‘mobile’ over ‘immobile’ taxpayers and beneficiaries, which likewise amounts to a change in constituencies. Focusing on the tax side of the equation, Snell and Jaakkola suggest in their article that national tax sovereignty can be rescued, or upgraded, by means of supranational tax solidarity. As to the expenditure side, in their respective articles Ferrera and Sankari/Frerichs debate the potential and pitfalls of a Europeanised form of social citizenship which accommodates free movement rights at the expense of national welfare privileges.

The link between integrated capital markets and the reformed monetary union has been highlighted in this introduction by showing the continuity of fiscal [recte: financial] and

142 As in opening access for EU citizens to national social systems.
143 As in pooling resources on the European level and distributing them to Member States.
144 Streeck, above, n. 81, at 12-13.
145 Ibid., at 12; original emphasis.
147 Cf. Frerichs, above, n. 76.
monetary integration. But that link is also evident in the shift from private debt to public debt in the transformation of the global financial crisis into a European sovereign debt crisis. As Juutilainen’s article shows, the commodification and securitisation of debt, which helps creditors to manage the risks inherent in debt relations and which is an institutional precondition for the globalisation of capital markets, remains ambiguous in its social effects and may eventually cause systemic instabilities. The new watchword is ‘financial stability’, which is to be furthered by enhancing ‘micro-prudential’ as well as ‘macro-prudential’ financial regulation. As Tuori shows in his article, crisis management by the European system of central banks not only moved ‘bad risks’ from private creditors and investors to the Eurosystem and, hence, to European taxpayers, but also implied hidden transfers, or the mutualisation of risk, between creditor and debtor states. However, as Losada’s article makes clear, the institutionalisation of creditor-debtor state relations in the enhanced EMU takes place under strict conditions of consolidation and structural adjustment in debtor states, which, once more, brings to bear the rights of (international) creditors against (national) taxpayers. In this way, the reformed monetary union reinforces the logic of interdependent welfare states.

What we are left with is an indicative picture of what the European community of debt means for the distribution of rights, risks, and responsibilities within and between its different constituencies. If the rights of consumer debtors are emphasised, this increases the responsibilities of their commercial creditors, but it may also serve to compensate for the loss of welfare rights. If risks are reallocated from the private to the public sector, this may help to avoid a financial meltdown, but it also means that commercial investors benefit at the expense of ordinary taxpayers. If European corporations or citizens make use of their free movement rights, this puts strains on Member States with relatively high taxes and relatively generous social benefits, which in turn may annoy national populations. If Eurozone Member States are rescued (or hindered) from sovereign default, creditor states incur greater risks and may expect debtor states to take greater responsibilities through reforms of taxes and social benefits, which may, again, give rise to popular protest. The ‘moral economy of debt’ in Europe cannot be summed up in one term, but requires study of how the law strikes a balance between public and private actors, creditor and debtor states, mobile and immobile citizens, investors and taxpayers, workers and consumers – and how this balance is readjusted over

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time. As recent developments suggest, an emerging pro-debtor orientation with regard to consumer debtors can coincide with a persistent pro-creditor orientation with regard to sovereign debtors, or, in other words, a normalisation of private default may go along with a moralisation of public default. To understand such ‘double standards’, one has to understand the hidden links, which requires putting law in its context.

149 Block-Lieb, above, n. 71.